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No. 83-2139

IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 1983

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JOHN D. ROCKEFELLER IV, individually and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

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# APPENDIX

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# APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1790

John M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexeline Perrine, Francis D.
Radcliff, Robert W. Robinson,
Michael Shepherd, Larry Williams
and Larry W. Griffin, Appellees,

versus

Walter Gilbertson and
Charles L. Miller, Appellants,

and

John Gum, Wilton Williams,
individually and as
Commissioner of the West Virginia
Department of Highways; and
John D. Rockefeller, IV,
individually and as Governor of
the State of West Virginia, Defendants.

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No. 83-1791

John M. Bever, Clearyl Davis,
John E. Ellifritt, Cecil Fling,
Drexeline Perrine, Francis D.
Radcliff, Robert W. Robinson,
Michael Shepherd, Larry Williams
and Larry W. Griffin, Appellees,

versus

John D. Rockefeller, IV., Appellant,

and

John Gum, Walter Gilbertson,
Wilton Williams, Charles L. Miller,
individually and as Commissioner
of the West Virginia Department
of Highways, Defendants.

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Appeal from the United States District Court for the Southern District of West Virginia, at Charleston, Charles H. Haden, II, District Judge, 82-2506

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Argued October 5, 1983
Decided January 11, 1984

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Before WINTER, Chief Judge, HALL, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge

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Robert B. King (Rebecca A. Betts, King, Betts & Allen on brief) for Appellant John D. Rockefeller, IV; David P. Cleek, Deputy Attorney General (Chauncey H. Browning, Attorney General; Edward W. Eardley, Steptoe & Johnson on brief) for Appellants Charles L. Miller and Walter L. Gilbertson; Timothy N. Barber (Guy R. Bucci on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

In 1981, West Virginia's Department of Highways allegedly was confronted with the need to substantially cut its expenditures. It chose to terminate the employment of a large number of lower echelon employees. According to plaintiffs, the sole or principal criterion for the selection of those to be terminated was political party affiliation. Loyal Democrats were to be retained while Republicans and Independents were to be terminated.

There are now pending in the Northern and Southern Districts of West Virginia a number of cases brought by terminated employees of the Department of Highways alleging that their terminations were in violation of their constitutional rights of free association. The plaintiffs in this case are such

terminated employees who worked under the supervision of John Gum, County Supervisor for the Department of Highways in Doddridge County. The defendants are Governor John D. Rockefeller, IV, Charles L. Miller, Commissioner of West Virginia's Department of Highways, Walter Gilbertson, District Engineer of District 4 of the Department of Highways, Gum and Wilton Williams, Chairman of Doddridge County Democratic Executive Committee. The amended complaint sought injunctive relief, including reinstatement of the plaintiffs to their former jobs, and damages. Governor Rockefeller, Commissioner Miller and District Engineer Gilbertson were sued both in their official and individual capacities, and they claim qualified immunity from the claim of damages against them personally. The immunity claim was the basis of a motion for summary judgment. The motion

was denied by the district judge largely on the basis that those defendants could not reasonably have believed that a political criterion for the selection of those employees whose employment was to be terminated was permissable under the Constitution of the United States.

Those three defendants sought a certificate by the district judge for a permissable interlocutory appeal under 28 U.S.C.A. § 1292(b). The district judge refused such certificaation, whereupon those three defendants filed notices of appeal under 28 U.S.C.A. § 1291. The question now before us, upon a motion to dismiss the appeals, is whether these appeals are within the collateral order exception to the general rule that appeals of right are allowable only from final judgments.

I.

As developed in Cohen v. Beneficial

Loan Corp., 337 U.S. 541, and subsequent cases in the Supreme Court, an appeal from an interlocutory order under § 1291 may be taken, if the interlocutory order conclusively determines the question in the trial court, resolves an important question independent of the subject matter of the litigation, is effectively unreviewable on appeal from a final judgment or so important that review should not wait upon final judgment, and presents a serious and unsettled question upon appeal.

In Cohen itself, the plaintiffs were small shareholders who brought a derivative stockholders' action within the diversity jurisdiction of the federal courts. The defendants, faced with the prospect of large litigation expenses, sought an order compelling the plaintiffs to post security for them under a state statute which required the plaintiffs to

reimburse the defendants for such expenses in the event that the defendants prevailed. The district court denied the motion to compel the posting of such security.

It is obvious that in Cohen, if an immediate appeal was not available and the case proceeded to final judgment, the defendants would have lost irretrievably the security they sought to gain by the motion, and the purpose of the statute imposing the burden of costs upon the losing plaintiffs would have been substantially frustrated.

Orders denying claims of absolute immunity have been held within the Cohen collateral order exception. In Helstoski v. Meanor, 442 U.S. 500 (1979), the claim was one of immunity under the Speech and Debate Clause. In Abney v. United States, 431 U.S. 651 (1977), the claim was one of immunity under the Double

Jeopardy Clause, while in Nixon v. Fitzgerald, 457 U.S. 731 (1982), the claim was one of absolute immunity for the President of the United States.

Claims of absolute official immunity are rightfully classified with claims of immunity under the Double Jeopardy Clause and the Speech and Debate Clause. In each instance, an important aspect of the absolute immunity with which the person is clothed is that he not be put to trial at all, and the right not to be put to trial at all is irrevocably lost if an order putting such person to trial may not be reviewed until after final judgment.

The qualified immunity, with which the three appellants are cloaked, is of a lower order. It provides substantial protection for a public official who acts under circumstances in which a reasonable person would believe that his conduct did

not violate established constitutional rights of another. That such a defendant not be put to the trouble of defending himself on the merits is also an aspect of immunity. Indeed, in Harlow v. Fitzgerald, 457 U.S. 800, the Supreme Court sought to give additional protection against being put to trial on insubstantial claims to persons possessing qualified immunity. It eliminated the subjective aspect of the qualified immunity doctrine as theretofore understood so that more claims of qualified immunity could be resolved on motions for summary judgment before trial.

It is far from clear, however, that an order denying a claim of qualified immunity is within the collateral order exception. While the Supreme Court in Harlow v. Fitzgerald considered the contours of qualified immunity, the case

got there because the order in the district court denied Harlow's claim of absolute immunity. See, note 11, 457 U.S. at 806. In McSurely v. McClellan, 697 F. 2d 309 (D.C. Cir. 1982), the court held that an order denying a claim of qualified immunity was within the collateral order exception, a position with which a panel of this court (Judges Hall, Murnaghan, and Haynsworth) differed in an unpublished opinion in Benford v. American Broadcasting Companies, Inc., (No. 83-1168, 1983).

Whatever the situation might be in other circumstances, however, the qualified immunity claimed by these three appellants cannot prevent their being put to trial. The plaintiffs seek equitable relief as well as money damages, and the appellants have no immunity from being

put to trial on the equitable claims.[1] They are the principal defenders of the state's position. They will bear a major responsibility for the outcome of the

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1. Our dissenting brother suggests that Governor Rockefeller and District Engineer Gilbertson were not proper parties to this action insofar as injunctive relief is sought. If reinstatement were the only equitable remedy sought, complete relief might be obtainable if Highway Commissioner Miller, or his successor, was the only named defendant, but the plaintiffs also seek an injunction prohibiting all defendants from conspiring to violate plaintiffs' constitutional right to be free of discrimination in employment based entirely upon political party considerations. Commissioner Miller serves "at the will and pleasure of the Governor" W.Va. Code 6-7-2A, and is vulnerable to pressure from the Governor. Commissioner Miller is responsible for "the selection, employment, and effective organization of all Commission personnel --" W.Va. Code 17-2A-4. Doubtless it is he who sets broad policy, but he may act only through subordinates, such as District Engineer Gilbertson, who either makes specific personnel decisions within the guidelines set by the Commissioner or who, at least, may make recommendations to the Commissioner. We conclude that Governor Rockefeller and Engineer Gilbertson are proper parties insofar as injunctive relief is sought.

litigation and will be among the principal witnesses at the trial. Whether or not they are immune from an assessment of damages against them in their individual capacities, the litigation will demand their time and attention. A present declaration of immunity from damage claims cannot avoid the diversion of their attention from other official duties which the litigation will occasion.

If the personal pocketbooks of the three appellants are, or may be, at risk, the degree of their distraction from other official duties may be greater than it otherwise would be. Still, one would suppose that, if the risk of personal liability were eliminated, the three, as responsible public officials, would give the litigation all of the thought and attention necessary adequately to protect the interest of the state.

The doctrine of qualified immunity cannot protect a public official from a claim of personal liability. It may provide a means by which the litigation may be terminated sooner than it otherwise might be, and it provides the official with substantive protection against personal liability for official wrongs other then a violation of established constitutional rights. In this case, however, a trial had been scheduled, and, if these appellants had nothing to do with the selection process and bore no responsibility for it, as they claim, they might have obtained a favorable judgment on the claims against them individually sooner by a trial on the merits than by appellate litigation of their immunity claims.

In these circumstances, the question whether a denial of the immunity claims is appealable before trial and final

judgment, would appear to have little effect upon the willingness of responsible persons to serve in public office. That is one of the reasons for the existence of the doctrine of qualified immunity, and a claim of personal liability on the part of a public official should be adjudicated with reasonable promptness. Here, however, trial on the merits is at hand, and the appellants can look forward to prompt vindication of their positions if they are correct in their claims that they were not participants in the selection process and were not otherwise responsible for it.

If the question of qualified immunity is still in the case after final judgment in the district court, it may readily be reviewed in an appeal from that judgment.

Generally, in the Supreme Court the

collateral order exception has been confined to situations in which the claimed right would be lost or deprived of its practical value if immediate review is not provided. This is true in absolute immunity cases in which the defendant is entitled not to be put to trial. Other preliminary orders of great importance to the litigants have been held not within the doctrine. Pretrial discovery orders may not be reviewed before final judgment. Cobbledick v. United States, 309 U.S. 323 (1940), and United States v. Ryan, 402 U.S. 530 (1971). An order denying class certification is not within the doctrine. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). Nor is an order refusing to disqualify counsel. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Litigants may desire early appellate rulings on important orders of

that sort, but the collateral order exception is a narrow one and reserved for rare cases. Such a one was Mercantile National Bank. v. Langdeau, 371 U.S. 555 (1963), where the question was one of venue in protracted litigation against two national banks which asserted a right not to be put to trial at all in the court in which the action had been brought. The question of venue is subject to appellate review after final judgment, but the court was moved by the specter of the great waste that would occur if the extensive litigation were permitted to proceed in the wrong court.

There are no comparable circumstances here. There is no problem of jurisdiction or venue in the district court. The trial must proceed in any event, and the question of qualified immunity is readily subject to appellate review after final judgment.

In the lower federal courts, orders denying claims of absolute immunity have been held appealable before trial. Chavez v. Singer, 698 F. 2d 420, 421 (10th Cir. 1983); Forsyth v. Kleindienst, 599 F. 2d 1203, 1208-1209 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981) (Forsyth I); Forsyth v. Kleindienst, 700 F. 2d 104 (3d Cir. 1983) (Forsyth II. In Forsyth I, an interlocutory appeal from an order denying a claim of qualified immunity was not allowed, and the court said it was not even seriously contended that those orders met the Cohen requirements. In Forsyth II, the majority expressed skepticism about the appealability of the denial of summary judgment on the claim of qualified immunity referring to the Supreme Court's decision in Harlow v. Fitzgerald and the decision of the United States Court of Appeals for the District of Columbia

Circuit, mentioned above, in McSurely v. McClellan. By eliminating the subjective component of the qualified immunity claim, the Supreme Court clearly intended to facilitate disposition of claims of qualified immunity on summary judgment motions, but one must read much into that opinion to conclude that the Supreme Court also intended that denials of such motions should be immediately appealable. If, however, it may ultimately be determined that such an order is immediately appealable if the effect of the immunity claim would be to terminate the litigation insofar as the immune defendant is concerned, this case is different. Partial summary judgment for these appellants on the damages claims against them individually would not terminate the litigation nor avoid the necessity for a trial and active participation in it by these appellants.

Under these circumstances, we cannot read Harlow v. Fitzgerald as a basis for a conclusion that this denial of summary judgment meets the Cohen requirements.

II.

There is another reason for dismissal of this appeal as premature.

One of the requirements for immediate appealability of a collateral order under the Cohen doctrine is that it presents a serious and unsettled question of law. A public official, clothed with qualified immunity, is not required to anticipate future development of constitutional doctrine, but he is required to respect the established constitutional rights of others. His qualified immunity is not available to him if he does not do that.

In 1981, when these plaintiffs were terminated as employees of the Department of Highways, their constitutional right

not to be discharged solely because of their political affiliation was clearly established. Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). The plaintiffs were not confidential employees nor policy makers. Indeed, there is no contention here that they are not the kind of employees who enjoy the protection of the Elrod-Branti principle.

Instead, the defendants contend that their discharge was not solely because of the lack of affiliation with the Democratic Party. It was for economic reasons, they say.

We may accept the fact that in 1981 fiscal considerations made a reduction in force in the Department of Highways necessary or appropriate. The decision that a reduction in force is necessary, however, was only a backdrop. It did not identify those employees to be terminated

or those to be retained. It only set the stage for those specific employment decisions which would identify those employees who were to be released and would effect their actual terminations. The Elrod-Branti principle fully protected all of the lower echelon employees of the Department as their superiors approached the task of implementation of the reduction in force.

It is true that in both Elrod and Branti the patronage system had been operating to procure the discharge of members of an unfavored party to replace them with members of a favored party. Proof that the discharges were solely for political purposes may be facilitated when there are immediate replacements by members of a favored party, but the Constitution protects the rights of existing employees against discharge solely for political reasons. If, in the

implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithfulness to their jobs but solely on the basis of their political affiliations. the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle.

The defendants place major reliance on Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980), but that case is of no assistance to them. In that case, a court had ordered the reinstatement of a number of Democrats who had been discharged solely for political reasons. The affected departments of the State of Illinois discharged a number of Republicans in order to make room for the Democrats to be reinstated. Considerations of fiscal limitations and

efficiency militated strongly against the employment of both groups. In that case, however, the pool from which the employees to be terminated were selected was composed entirely of Republicans. Republican affiliation was not the criterion of selection, and it was properly concluded that economic necessity was the reason for their termination.

Wren is thus nothing like this case where the allegation is that party affiliation was the sole criterion by which these plaintiffs were selected for discharge. At least so far, this is not a mixed motive case. Economic considerations may have occasioned the reduction in force. They did not dictate, or even address, the political criterion by which those to be discharged allegedly were chosen.

III.

Because this collateral order is not within the Cohen exception to the rule that appeals of right may be taken only from final judgments, the appeal is dismissed.

APPEAL DISMISSED

HALL, Circuit Judge, dissenting:

I cannot accept the majority's dismissal of these appeals as interlocutory. In concluding that pretrial review is unavailable, the majority has ignored both the facts of this case and applicable law. In my view, the district court's order, denying appellant's claims of qualified immunity, is precisely the type of preliminary ruling which necessitates immediate appellate review. For this reason, I must dissent.

I.

This case is one of nine civil actions currently pending against West Virginia's Governor Rockefeller, Department of Highway (DOH) Commissioner Miller, and various DOH District Engineers for their alleged participation in a conspiracy to terminate some sixty former DOH employees for political

reasons. In this case, as in the others, plaintiffs are Republicans and Independents, who seek to hold Governor Rockefeller, a Democrat, and other state officials personally liable for monetary damages. The state defendants deny that they are liable for damages because of their entitlement to qualified or "good faith" immunity.

In the proceedings below Governor Rockefeller, Commissioner Miller, and District Engineer Gilbertson moved for summary judgment based on their official immunity. The parties agree that the matter was ripe for summary disposition and that no facts regarding the immunity claim remain unresolved. According to the uncontradicted evidence neither Governor Rockefeller nor the other two appellants were personally involved in the selection of these nine plaintiffs for termination. Moreover, the record

also clearly establishes that none of the three at any time considered, suggested, authorized, or otherwise intended that the terminations be politically motivated. Finally, as plaintiffs concede, it is clear that the terminations arose as a result of an economically necessitated reduction in force.[1/] Notwithstanding these undisputed facts, the district court denied the motions for summary judgment and these appeals followed.

In my view, the majority erroneously holds that the appeals from the denial of summary judgment must await the outcome

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1/ The record in this case demonstrates that because of the state's fiscal crisis in late 1980, over 1,500 DOH employee positions were eliminated in 1981, the year of plaintiff's terminations. As of now, more than 2,600 DOH employees have lost their jobs since the end of 1980. This represents an elimination of approximately one-third of the DOH workforce as it existed in late 1980.

of the trial. Under 28 U.S.C. § 1291 only appeals from final judgments are ordinarily permitted. Nevertheless, as the majority notes, an exception to this general rule, known as the collateral order doctrine, has been recognized by the Supreme Court in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949), and other cases. To fall within the collateral order exception, the order appealed from must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; (3) be effectively unreviewable on appeal from a final judgment; and (4) present a serious and unsettled question on appeal. In the companion cases of Nixon v. Fitzgerald, 457 U.S. 731 (1982), and Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court recognized the applicability of the collateral order

doctrine to both absolute and qualified immunity claims and the need for pre-trial appellate review of the denial of such claims. Other Circuit Courts, applying Harlow, have affirmed the appropriateness and need for immediate review of official immunity claims. Chavez v. Singer, 698 F. 2d 420, 421 (10th Cir. 1983); McSurely v. McClellan, 697 F. 2d 309, 316 (D.C. Cir. 1982); Forsyth v. Kleindienst, 599 F. 2d 1203, 1208-1209 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981) (Forsyth I); Forsyth v. Kleindienst, 700 F. 2d 104 (3d Cir. 1983) (Forsyth II). The majority, however, has concluded that Harlow is not controlling and that these appeals do not meet the four criteria of the collateral order exception to 28 U.S.C. § 1291. I disagree. In my opinion, if ever there was a case which justified application of Harlow and the collateral order doctrine,

this is certainly the one.[2/]

II.

Official immunity has long been recognized as a concept essential to the effective functioning of government.

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[2/] The majority's reference to the unpublished decision in Benford v. American Broadcasting Companies, Inc., et al., No. 83-1168 (4th Cir., April 11, 1983), in no way deters me from finding Harlow applicable in this instance. The two cases are factually distinct. In Benford, we simply held that an immediate appeal of the district court's order denying summary judgment was not warranted when the qualified immunity defense was not finally determined and where the disappointed movants could still present facts at trial in support of their claim to immunity. In that case, the district court ruled that the Congressional staff defendants had acted beyond the scope of their authority and, therefore, lacked standing to assert a qualified immunity defense; however, in deciding against the Congressional defendants, the district court left open the possibility that they could prove certain facts at trial which would entitle them to qualified immunity. Here, on the other hand, all of the facts pertaining to the qualified immunity defense asserted by Governor Rockefeller and the other state officials have been presented and the district court has conclusively resolved their immunity claims against them.

Butz v. Economou, 438 U.S. 478 (1978). As noted by the Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 239 (1974), officials, including a state's chief executive officer and his aides, must be permitted "to perform their official functions free from the threat of suits for personal liability." The Supreme Court in Harlow expressed its frustration with the increasing burdens imposed on public officials in defending against "insubstantial claims" and made clear that suits brought against public officials for alleged constitutional torts should be screened at the earliest stages of litigation:

> In Butz, we admonished that "insubstantial" suits against high public officials should not be allowed to proceed to trial. 438 U.S., at 507. . . . We reiterate this admonition. Insubstantial lawsuits undermine the effectiveness of Government as contemplated by our constitutional structure, and

> firm application of the Federal Rules of Civil Procedure" is fully warranted in such cases. Id., at 508.

457 U.S. at ____, 102 S.Ct. at 2739, n. 35.

Accordingly, the Supreme Court departed from the earlier requirement that in order to be entitled to qualified immunity an official must show both objective and subjective good faith. Under Harlow, it is sufficient for purposes of good faith immunity if the conduct in question did not violate clearly established rights which a reasonable person would have known. In recasting this standard, the Harlow Court noted:

> (I)t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty - at a cost not only to the defendant officials, but to the society as a whole (footnote omitted). These social costs include the expenses of

> litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible (public officials), in the unflinching discharge of their duties." Gregiore v. Biddle, 177 F. 2d 579, 581 (CA 2 1949), cert. denied 339 U.S. 949 (1950).

457 U.S. at ____, 102 S.Ct. at 2736.

As the District of Columbia Circuit held in McSurely, the Supreme Court in Harlow "consciously sought to facilitate summary disposition of insubstantial claims against governmental officials. Consequently, . . . appellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trial under qualified immunity on the same basis as for absolute immunity." 697 F. 2d at 316. Similarly, the Third Circuit in

Forsyth II, 700 F. 2d at 105, stated that a claim of absolute immunity". . . protects a right not to be subjected to trial - a right that is lost if appellate review awaits final adjudication. If follows, therefore, that a stay (of the trial) must be granted or the defendant will be deprived of the benefits of adjudication before trial."

The majority, however, rejects the McSurely and Forsyth II analysis. It stresses in Part I of its opinion that, because plaintiffs seek reinstatement to their former jobs as well as damages, appellants must proceed to trial in any event, and, therefore, the denial of immediate appellate review does not result in an irretrievable loss to appellants. This mistaken view ignores

the fact that neither Governor Rockefeller nor District Engineer Gilbertson are proper parties for injunctive relief.[3/] Furthermore, the majority's holding can easily lead to the pernicious practice of tacking on a claim for injunctive relief in order to avoid summary judgment and force officials to go to trial on meritless damages actions. In an appropriate case, the majority's rationale might have merit. It can have no application, however, in a case such as this, where public officials are contesting the right to be haled into Court in their personal capacities[4/] and face trial on what is clearly an insubstantial claim for damages.[5/]

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[3/] Under W.Va. Code § 17-2A-4 (1983), only Commissioner Miller has the authority to order reinstatement.

[4/] The majority concludes that it makes no difference whether the personal pocketbooks of appellants are at risk or

(footnotes 4 and 5, continued)
not insofar as their distraction from official duties is concerned. This position, however, completely overlooks the fact that an official being sued personally for money damages may be required to retain private counsel at his own expense. Furthermore, the fear of being sued and held personally liable for damages is a far cry from a suit for reinstatement or injunctive relief, which public officials face regularly in the course of performing their duties. As the Supreme Court noted in Harlow, 457 U.S. at ____, 102 S.Ct. at 2736, 2738, the threat of personal liability could deter all but the most resolute or irresponsible from discharging their public duties, or even from being willing to serve in public office.

5/ A review of the current state of the record quickly reveals the insubstantiality of plaintiffs' claim. Plaintiffs allege that appellants participated in a scheme to oust them from their jobs for political reasons, of that appellants knew, or should have known, that the terminations were illegal and did nothing to prevent them. These allegations, however, when submitted to the test of appellants' motions for summary judgment, are not supported by a single shred of evidence, and the majority cites none.

Appellants' affidavits substantiate their defense that the terminations were due to financial necessity and indicate that none of the appellants had any personal involvement whatsoever in plaintiffs' selection for discharge by another defendant, County Supervisor John

(footnote 5, continued)
Gum. That plaintiffs were discharged solely by Gum, and without consultation, is further supported by Gum's deposition, in which he stated that he alone made the decision to terminate plaintiffs.

None of plaintiffs' submissions, in response to these affidavits and supporting documentation, in any way contradict appellants' evidence. In fact, one of plaintiffs' submissions, a deposition taken of Governor Rockefeller in connection with other litigation, reveals that political hiring and firing was specifically disavowed by the Rockefeller administration. It further demonstrates that 55% of the DOH employees terminated in 1981 were persons hired by Governor Rockefeller's administration, while only 38-39% of those terminated were persons hired by the former Republican administration.

I am thus at a loss to understand the district court's rationale for allowing the damages claim to proceed to trial on the ground that "(p)laintiffs' response . . . sets forth allegations which if assumed to be true for the puroses of this motion preclude summary judgment." Under Fed. R. Civ. P. 56 (e), once a motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of his pleading." The rule requires the responding party to set forth specific facts showing that there is a genuine issue for trial or else have summary judgment entered against him. The district court's holding is incompatible with Rule 56 and mandates trial where there are mere allegations of politically motivated terminations. By dismissing these appeals, the majority seems to sanction this unwarranted practice.

motivated at least in part by a fiscal crisis, is open to serious question.

As recognized in Abraham v. Pekarski, 537 F. Supp. 858, 863-64 (E. D. Pa. 1982):

> Few Supreme Court decisions in recent years have generated as much litigation and controversy as have Elrod and Branti. Moreover, because of the lack of a majority opinion in Elrod, a problem not cured by Branti, the sweep of Elrod and Branti has been subject to a good deal of critical analysis seeking to assess their reach (footnotets omitted).[6/]

The decisions of our own Court reflect the continued uncertainty surrounding Elrod's scope and applicability. In Ramey v. Harber, 589

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6/ Judge Aldisert of the Third Circuit Court of Appeals made the following observation in his concurring opinion in Loughney v. Hickey, 635 F. 2d 1063, 1069 (3d Cir. 1980): "I suggest that the various majority opinions in both Elrod and Branti are not capable of public comprehension."

F. 2d 753 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979), this Court noted the factual distinctions between that case, which involved a newly elected sheriff's failure to rehire deputies who had actively campaigned against him, and the Elrod case. Although the majority found it unnecessary to determine the applicability of Elrod to the Ramey facts, it nonetheless expressed its reservations in this regard: "The district court's decision is supported by the broad sweep of the Elrod plurality, but there is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices." 589 F. 2d at 757.[7/]

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7/ Other decisions in this Circuit which reflect the continuing uncertainty over the scope of Elrod include: Delong v. United States, 621 F. 2d 618, 625 (4th Cir. 1980) (Dumbauld, J., concurring:

Courts in other Circuits have also wrestled with the meaning of Elrod. In spite of the majority's view that the Seventh Circuit's decision in Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980), cert. denied, ____ U.S. ____, 102 S. Ct. 129 (1981), is of no aid to appellants, I find that case instructive. In Wren, the Seventh Circuit was called upon to weigh the fiscal interest of the State against the Elrod rights of public employees in Illinois. In this connection the Wren Court held that "(i)n view of the involuntary requirement that (certain)

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(footnote 7, continued)

"appellant's situation does not fall within Elrod. He has not been discharged, or threatened with discharge. He has simple been transferred. . ."') and Johnson v. Bergland, 586 F. 2d 993, 996 (4th Cir. 1978) (Hall, J., dissenting: ". . . the majority's reliance on Elrod v. Burns . . . is misplaced; there the infringement of first amendment rights was direct and immediate, not indirect and speculative.")

plaintiffs be reinstated, and of the fiscal exigencies, . . . the State's interest in maintaining prudent control over the efficient use of their (sic) resources outweighs any minimal impact on the plaintiffs' right to political association." Id. at 1287. (emphasis added).

Whether or not Elrod applies in the instant case, where a substantial portion of the public employment sector had to be permanently eliminated for legitimate financial reasons, is, therefore, by no means clear and settled. Except for economic necessity, all of the plaintiffs would have remained in their DOH jobs in 1981. Thus, the applicability of Elrod to the facts of this case, and the constitutional violations which plaintiffs assert, are highly questionable and at the very least justify pre-trial review by this Court

under the collateral order doctrine.

IV.

The majority's denial of pre-trial review under the circumstances presented in this case flies in the face of Harlow and conflicts with decisions by other Circuit Courts which have allowed immediate review of the denial of official immunity claims. As a result, appellants have had their claims to qualified immunity conclusively resolved against them. They have irretrievably lost whatever claim they may have to official immunity, not only in this case, but possibly in the eight other related cases now pending against Governor Rockefeller, Commissioner Miller, and other District Engineers like Gilbertson. Denying appellate review irreparably harms not only these public officials, but also the public at large and the very concept of official immunity.

For the foregoing reasons, I would hold that we have jurisdiction of these appeals under the collateral order doctrine and would address the immunity claims on their merits.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

CHARLESTON

JOHN M. BEVER, et al,

Plaintiffs,

vs. CIVIL ACTION NO. 82-2506

JOHN GUM, et al,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon numerous dispositive motions by Defendants Gum, Gilbertson, Miller[1] and Rockefeller. Certain of the motions challenge Plaintiffs' original complaint, which has since been superseded by the amended complaint filed March 28, 1983. Certain other motions have been rendered moot by this Court's continuance of the

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[1] Defendants Gum, Gilbertson and Miller are jointly represented.

injunction hearing previously scheduled for March 7, 1983. One motion is unopposed. Remaining are four dispositive motions post-dating the amended complaint, which are opposed by Plaintiffs. These latter four motions substantially overlap; two were submitted on behalf of Defendant Rockefeller, two were submitted by the Defendants, Gilbertson and Miller. Prior to reviewing the substance of these motions, the Court deems it appropriate to summarize the events of this litigation from its inception to the present time.

Plaintiffs originally brought this action in the Circuit Court of Kanawha County, West Virginia. Subsequently, Defendants filed a petition for removal[2]

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[2] All Defendants were at that time jointly represented by the Attorney General of West Virginia and counsel for the state insurance carrier.

pursuant to 28 U.S.C. § 1441; Plaintiffs responded by moving to remand the case back to Kanawha County. By Order entered November 17, 1982, this Court held that, since the action had been properly removed under the provisions of 28 U.S.C. § 1446, and since federal question jurisdiction existed, the Court had no discretion to remand. Discovery then commenced in anticipation of the March 7, 1983, injunction hearing.

Redress is sought in this action for the alleged deprivations of Plaintiffs' right to free political association and affiliation, which they contend occurred under a system of political patronage in effect within the Department of Highways (DOH), and specifically in Doddridge County, West Virginia. The alleged "political firing" of the ten Plaintiffs, all registered Republicans, was said to have been perpetrated by Defendants under

the democratic administration of West Virginia Governor John D. Rockefeller, IV. Three of the remaining Defendants, John Gum, Walter Gilbertson and Charles L. Miller, were supervisory officials of the DOH during the period in question; Defendant Wilton Williams was democratic committee chairman of Doddridge County, West Virginia, the situs of Plaintiffs' employment.

This action was brought pursuant to the provisions of Title 42, United States Code, Sections 1983 and 1985, and under the authority of Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980). Plaintiffs alleged in their complaint two alternative theories of liability: (1) that all Defendants participated directly in a conspiracy to deprive them of their civil rights; and/or (2) that the Defendants Gilbertson, Miller and Rockefeller

indirectly violated their rights by failing to act when they "knew or should have known" of the alleged unconstitutional conduct.

Defendants answered the complaint, denying unlawful conduct and affirmatively asserting both their official immunity and their good faith in acting as officers of the state.[3] The immunity defense, although not raised by motion prior to the scheduled prehearing conference, was nevertheless considered by this Court in anticipation of the March 7 injunction hearing. The Court determined, and so informed the parties on March 2, 1983, that under the Eleventh Amendment to the United States Constitution and under Edelman v. Jordan, 415 U.S. 651 (1974), Alabama v. Pugh, 438

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[3] Wilton Williams, however, was not a state employee and thus could assert no immunity or good faith defenses.

U.S. 781 (1978), and Quern v. Jordan, 440 U.S. 332 (1979), Plaintiffs were precluded from obtaining injunctive relief in the form of back pay from the state officials in their official capacities.[4] Plaintiffs were then given the option of (a) proceeding against Defendants on March 7 solely to determine their entitlement to prospective injunctive relief, i.e., reinstatement, or (b) of amending their complaint to replace their back pay request with a prayer for money damages in that amount from Defendants as individuals.[5]

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[4] This decision was made prior to the issuance of the West Virginia Supreme Court of Appeals' decision in Martin v. West Virginia Board of Regents, No. 15438 (June 30, 1983).

[5] The complaint as originally filed sought only injunctive relief: That is, retrospective relief in the form of back pay; and prospective relief in the form of reinstatement to their previously held positions.

plaintiffs chose to amend their complaint.

The motions of Defendants Gum, Gilbertson, Miller and Rockefeller in their individual capacities for judgment on the pleadings are based upon the character of the relief requested in Plaintiffs' original complaint. While Defendants as individuals may have been entitled to partial judgment on the pleadings had the complaint not been amended, since the injunctive relief sought was recoverable merely from Defendants as State officials, because the Plaintiffs' claim now seeks money damages from Defendants, Defendants' motions are moot and, therefore, must be denied. See Burt v. Board of Trustees, 521 F. 2d 1201 (4th Cir. 1975); Miller v. Board of Education of Cty. of Lincoln, 450 F. Supp. 106 (S.D. W.Va. 1978).

Those issues revolving around

Plaintiffs' original prayer for relief were, as noted, heard by the Court at a prehearing conference conducted on March 2, 1983. Because Plaintiffs opted at that time to amend the complaint, this Court ordered the March 7, 1983, hearing continued and consolidated with the August 22, 1983, trial on the merits. By doing so, the Court thus rendered moot Defendants' motions for continuance and consolidation.

One other motion pre-dates Plaintiffs' amended complaint, that is, the motion of Defendant Rockefeller for judgment on the pleadings and for summary judgment. The bases for that motion are trifold: First, that the complaint fails to set forth Plaintiffs' allegations with the requisite particularity; second, that the record does not support the charges; and third, that Defendants are entitled to judgment because of their official

qualified immunity. The Court is of the opinion to deny this motion, primarily because the pleading and immunity issues and the discussion of the merits are addressed in subsequent motions post-dating the amended complaint.[6]

Remaining for decision, then, are six dispositive motions which post-date the amended complaint. Two motions filed on behalf of Defendants Gilbertson and Gum parallel two filed by Defendant Rockefeller; each have moved (1) for dismissal of Plaintiff, Drexelene

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[6] The pleading issue is raised in Defendant Rockefeller's motion to dismiss the amended complaint and the motion of Defendants Gilbertson and Gum for judgment on the pleadings and for summary judgment; the immunity issue is addressed in the subsequent motions by Defendants Gilbertson, Miller and Rockefeller for summary judgment based upon official immunity. That portion of Defendant Rockefeller's motion which is concerned with the merits is considered infra together with Defendants Gilbertson and Miller's motion for judgment on the pleadings and for summary judgment.

Perrine, and (2) for summary judgment based upon official immunity. In addition, Defendant Rockefeller has, as noted, moved for dismissal of the amended complaint, a motion which presents essentially the same allegations as Defendants Gilbertson and Miller's motion for judgment on the pleadings and for summary judgment. The motion for dismissal of Plaintiff Perrine is unopposed by Plaintiffs, and, therefore, may be granted without further discussion. The balance of the dispositive motions, are, however, opposed by Plaintiffs and memoranda in response thereto, supplemented by Plaintiffs' counsel's affidavit[7] have been submitted.

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[7] This affidavit is the subject of a motion to strike by Defendant Rockefeller. That motion will be addressed below.

I. Defendant Rockefeller's Motion to Dismiss the Amended Complaint and Defendants Gilbertson and Miller's Motion for Judgment on the Pleadings and for Summary Judgment

These dispositive motions, although variously styled, present essentially the same arguments, that is, insufficiency of the pleadings, and failure to state a claim. In addition, Defendant Rockefeller asserts that injunctive relief is inappropriate in this case and that, in any event, injunctive relief against him as Governor of West Virginia, is precluded both on the grounds of immunity and because he is not a proper party to afford Plaintiffs such relief.

Defendants' argument relating to insufficiency of the pleading is based primarily upon the degree of particularity with which Plaintiffs have supported their claims through factual allegations in the complaint. In support

of this argument, Defendants point to two specific defects: First, that the conspiracy claim failed to allege with particularity any "overt act" which would indicate Defendants actually participated in a conspiracy; and second, that Plaintiffs' "knew or should have known" claim is supported only by conclusory allegations, which indicate that Plaintiffs rely solely upon the doctrine of respondeat superior for their recovery.

In the Court's opinion, Plaintiffs support both their theories of liability, i.e., the conspiracy claim under 42 U.S.C. § 1985 (3) and the "knew or should have known claim" under Section 1983, by detailed allegations.[8] The complaint describes the political history of the

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[8] Four pages of the complaint are devoted to the explication of facts relied upon for relief by Plaintiffs.

DOH, the chronology and character of the Defendants' service with State government, the relationships of the Defendants with each other and with the Plaintiffs, the opposing party ideologies of Plaintiffs and Defendants, the details of Plaintiffs' employment history and their terminations, a statistical survey of employment practices of the Defendants with the DOH relative to the hiring of Democrats and Republicans, the alleged power of Defendants Gilbertson, Miller and Rockefeller to control discriminatory practices, their alledged knowledge of such practices, and their alleged intent to continue, and/or failure to prevent such practices. (Complaint, Paragraphs 3-18).

Defendants correctly argue that civil rights pleadings must set forth with particularity those facts upon which the pleader relies for relief. United

Black Firefighters of Norfolk v. Hirst, 604 F. 2d 884 (4th Cir. 1979); Picking v. State Finance Corporation, 332 F. 2d 1399 (D. Md. 1971) affirmed 450 F. 2d 881 (4th Cir. 1971) cert. denied 405 U.S. 1048; 2A Moore's Federal Practice, §8.17(5) at 8-182 (1979). The purpose of such a requirement, however, is not to require Plaintiffs to plead all of their evidence but merely to provide the Defendants with facts sufficient to apprise them of the nature of the charges in order that they may adequately plead and defend the cause. Picking v. State Finance Corporation, supra; Vasquez v. Ferre, 404 F. Supp. 815 (D. N.J. 1975); Jordan v. Wolke, 460 F. Supp. 1080 (E. D. Wis. 1978). Plaintiffs need not plead evidentiary facts in the complaint. E.g. School District of Kansas City, Missouri v. State of Missouri, 460 F. Supp. 421 (W.D. Mo. 1978); Yates v. Mahogony

Ass'n., 129 F. 2d 227 (3d Cir. 1941).

Pleadings are to be judged by substance, rather than by form, to facilitate the fair and just resolution of controversies between litigants; they should not be construed to raise barriers which prevent the achievement of that end. Matz v. Grasselli Chemical Co., 303 U.S. 197 (1938); Conley v. Gibson, 355 U.S. 41 (1957). In Ratcliffe v. Insurance Company of N. America, 482 F. Supp. 759 (E. D. Pa. 1980) the court was presented with the precise argument being made by Defendants here, i.e., that because civil rights cases require pleadings be made with factual specificity, Plaintiffs' claim should be dismissed. The court stated there that even though certain portions of the complaint were cast in conclusory language, where other sections alleged discriminatory acts with sufficient

specificity to meet the requirements of Rule 8, Federal Rules of Civil Procedure, and to give adequate notice of the charge to be defended, Defendants' motion to dismiss the complaint would be denied.

Similarly, in School District of Kansas City, Missouri v. State of Missouri, supra, the complaint was held reviewable under the provisions of Rule 8(a) requirements, not against some stricter standard.[9] The Court held there that the complaint was sufficient when it

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[9] This Court is of the opinion that those cases holding that greater specificity is required in civil rights complaints than in other types of complaints are not altering the basic rationale behind Rule 8, but are merely acknowledging the necessity for protection of Defendants' right to be adequately advised of the charges against him in an area of law wherein conclusory allegations provide the potential for abuse of the judicial process. The requirements of Rule 8(a) incorporate the rules of notice pleading, and are accorded a liberal construction. Conley v. Gibson, supra.

alleged that defendants transferred students for purposes of segregation, discriminated in employment, prevented changed in district boundaries which would have reduced segregation, and failed to correct the effects of pre-1954 segregation. The allegations set forth in Plaintiffs' complaint here are no less specific than those found sufficient in School District, and the Court would find, therefore, that the complaint was pleaded with sufficient particularity.

The Court's ruling just stated applies to both the "knew or should have known" claim and the conspiracy claim. Defendants argue that the conspiracy claim is defective as failing to allege an "overt act"; however, the Court deems that allegation in which Plaintiffs state they were terminated by reason of their political affiliation to meet that

requirement specifically.[10/] In reviewing the sufficiency of a complaint alleging conspiracy, the Court must take cognizance of the fact that Plaintiffs' access to specific facts surrounding a civil rights conspiracy is often limited; therefore, a certain degree of liberality in construction is warranted, particularly with regard to those allegations concerning combination of the conspirators. Vasquez v. Ferre, supra.

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[10] DeVitt and Blackmar defines an "overt act" as:

"Any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. . . . It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows or tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy. . . ."

2 DeVitt and Blackmar, Federal Jury Practice and Instructions, § 27.07 at 22 (1977).

The complaint is sufficient when it otherwise states a claim upon which relief can be granted.

Having found the complaint filed herein to be sufficiently specific to inform the Defendants of the charges which they are to defend, the Court now proceeds to determine the issue of whether a claim has been stated. Defendants do not seriously contend that political discrimination provided no basis for a cause of action in this Court; they could hardly do so in light of Elrod v. Burns, supra, and Branti v. Finkel, supra. Their argument, instead pivots around two supplemental contentions: (1) That because the pleadings are nonspecific as to particular actions taken by each Defendant, the Court can only conclude that Plaintiffs' theory of liability rests upon the doctrine of respondeat

superior; 11/ and (2) That, in the absence of such specific allegations, Defendants' averments of good faith should permit the Court to award Defendants judgment on the merits. The Court is not persuaded that Plaintiffs' complaint is deficient for either reason.

With regard to those contentions addressed to the merits, the Court would note that the parties have engaged in extensive discovery during the pendency of this action. In their second argument, Defendants have not made reference to the record in any comprehensive fashion to support their position that summary judgment on the merits is appropriate. Had they done so, the Court believes that material issues

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11 Plaintiffs cannot base a civil rights claim upon the theory of respondeat superior. Vinnedge v. Gibbs, 550 F. 2d 926 (4th Cir. 1977).

of fact would be shown in dispute. The complaint is not deficient for failing to overcome Defendants' allegations of good faith. Indeed, the United States Supreme Court held recently in Gomez v. Toledo, 446 U.S. 635 (1980) that plaintiff need not even allege bad faith in his complaint, that good faith is merely a matter of defense to be proved or disproved at trial. Clearly, then, Defendants' second argument must fail as a basis for dismissal of this action.

Defendants' first argument premises upon a finding by this Court of insufficient particularity in the pleading. Since the Court has determined otherwise, the sole question remaining is whether proper theories of liability have been asserted. To establish a conspiracy claim under Section 1985(3), Plaintiffs must allege four elements, that is:

1. That Defendants did conspire;

2. For the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection laws, or of equal privileges and immunities under the laws;

3. That one or more of the conspirators did, or caused to be done, any act in furtherance of the object of the conspiracy, whereby another was

4(a). Injured in his person or property, or

4(b). Deprived of having and exercising any right or privilege of a citizen of the United States. Griffin v. Breckenridge, 403 U.S. 88 (1971). Brekenridge involved an alleged deprivation of the black plaintiffs' right to free speech, assembly and association; the United States Supreme Court held these allegations supported the requisite animus to deprive plaintiffs of equal enjoyment of a legal right so as to state a claim under

Section 1985(3). Although Breckenridge involved allegations of invidious racial discrimination, a Section 1985 action may properly be based upon political class-based animus, as indeed, plaintiff did in Elrod. See also, Kimble v. D. J. McDuffy, Inc., 648 F. 2d 340 (5th Cir. 1981); Hampton v. Hanrahan, 600 F. 2d 600 (7th Cir. 1979) reversed in part on other grounds 446 U.S. 754, rehearing denied 448 U.S. 913; Gibbins v. Bond, 623 F. Supp. 845 (W.D. Mo. 1981) affirmed 668 F. 2d 967 (8th Cir. 1981). Cf., Marino v. Bowers, 657 F. 2d 1363 (3d Cir. 1981). Since Plaintiffs have alleged facts which, if assumed to be true, allege each element of a cause of action under Section 1985(3),[12] it is clear that a

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[12] Plaintiffs have alleged (1) a conspiracy; (2) their membership in a class of persons deprived of equal protection of the laws; (3) an overt act; and (4) injury to their property interest in employment.

claim upon which relief can be granted has been stated in Plaintiffs' complaint.[13]

The cause of action previously styled a "knew or should have known" claim falls under the provisions of 42 U.S.C. § 1983. As Plaintiffs correctly argue, only two allegations are necessary to state a claim under that section: (1) That some person deprived Plaintiffs of a federal right; and (2) That such person acted under color of state or territorial law. Gomez v. Toledo, supra. Elrod V. Burns makes clear that the acts complained of by Plaintiffs here implicate both First and Fourteenth Amendment rights. Defendants, with the exception of Defendant Wilton Williams, admit they were acting under color of

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[13] Plaintiffs might also establish their conspiracy claim pursuant to the provisions of Section 1983, under the following analysis.

State law when the alleged terminations occurred. These facts are sufficient without questions to state a claim against Defendant Gum. However, Defendants Gilbertson, Miller and Rockefeller challenge the complaint as insufficient based on Plaintiffs' alleged failure to aver an "affirmative link" indicating some personal involvement of these Defendants in the acts complained of. See Rizzo v. Goods, 423 U.S. 362 (1976). In the Fourth Circuit, such an affirmative link may be demonstrated through proof that a defendant "knew or should have known" of the challenged practice, but evidenced deliberate indifference to Plaintiffs' constitutional rights. Orpiano v. Johnson, 632 F. 2d 1096 cert. denied 450 U.S. 929. Since, in an action under the authority of Elrod and Branti, Plaintiffs' prima facie case does not

include dis-proof of an independent reason for the discharges, Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1976), Miller v. Board of Education of County of Lincoln, supra, the complaint herein, again assuming the truth of the facts alleged for the purposes of this motion, states a claim upon which relief can be granted under Section 1983. See also Brule v. Southworth, 611 F. 2d 406 (1st Cir. 1979); Tanner v. McCall, 625 F. 2d 1183 (5th Cir. 1980) cert. denied 451 U.S. 907 (1981). In summary, both of the theories of liability relied upon by Plaintiffs properly assert the stated causes of action.

One additional ground for dismissal was raised by Defendant Rockefeller in his motion, although not briefed by his memorandum: That the injunctive relief sought by Plaintiffs was not properly

directed toward him as Governor. The Court is of the opinion that this argument lacks merit, in view of the nature of the injunctive relief sought, i.e., a permanent injunction against all Defendants restraining them "from further violating the rights and immunities granted to Plaintiffs under the Constitution of the United States of America." (Complaint, p. 9 Paragraph a). Such an injunction, if issued, would appropriately be directed toward all Defendants, including Defendant Rockefeller. Neither is reinstatement an inappropriate remedy. McMullan v. Thornburgh, 508 F. Supp. 1044 (E. D. Pa. 1981) construing Johnson v. Bergland, 586 F. 2d 993, 995 (4th Cir. 1978). See also Burns v. Elrod, 509 F. 2d 1133, 1135 (7th Cir. 1975). Therefore, this remaining ground for dismissal must also be denied.

## II. Defendants' Motion for Summary Judgment Based on Official Immunity

Defendants Rockefeller, Gilbertson and Miller urge the Court in this motion to award them summary judgment based upon the qualified immunity each possesses as State officials. See Scheuer v. Rhodes, 416 U.S. 232 (1974). The basis for their argument rests upon the United States Supreme Court's recent holding in Harlow v. Fitzgerald, ___ U.S. ___, 102 S. Ct. 2727 (1982), wherein the Court held that "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id.

at 2738.[14/] In their motion, Defendants argue that the law governing "patronage termination" is not clearly established, and that, therefore, summary judgment is appropriate. Specifically, Defendants claim that Elrod and Branti preclude relief unless political affiliation can be shown the "sole cause" of Plaintiffs' terminations, and that "sole cause" has been accorded such varying interpretations in subsequent decisions that this Court must determine the constitutional rights at issue not "clearly established" for the purposes of evaluating the propriety of summary judgment under Harlow. Under this theory, Defendants argue that, given the necessity for a reduction in force which

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[14] The Harlow Court expressed no view upon the effect of a defendant's immunity defense in an action for injunctive or declaratory relief. Id at 2739, n. 34.

existed in fiscal year 1981, even if Defendants terminated Plaintiffs because of their affiliation with the democratic party, the law which purports to preclude this action was not so "clearly established" as to warrant continuation of this action againt them. Thus Defendants content they could not have been expected to realize that, even if an independent reason for terminating some person existed, they would not be free to select exclusively Democrats for that purpose, since those firings could not have resulted "solely" from political considerations. The Court cannot agree with this analysis.

Plaintiffs' constitutional right to freedom from termination based upon political affiliation or association has been "clearly established" since the Supreme Court's decision in Elrod. The same constitutional principle was

subsequently reaffirmed in Branti, prior to Plaintiffs' terminations.[15/] This case does not present the type of situation involved in Procunier v. Navarette, 434 U.S. 555 (1978) where defendants were held not liable for failure to foresee the establishment of a constitutional right prior to its enunciation.

Here, Defendants admit to actual knowledge of the ban on politically motivated terminations established in Elrod.

The test which governs the determination of whether a plaintiff's

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15 The Supreme Court's subsequent decision in Branti did revise the standard for determining which public employees were protected under Elrod; however, that revision concerned whether a plaintiff need establish his status as a "non-policy making, non-confidential" public employee. Defendants' argument is not directed toward this issue, but rather toward the role which political considerations may properly play in the decision to terminate an employee.

First and Fourteenth Amendment rights have been infringed by reason of a "political firing" is as clearly established as the right. This Court's decision in Miller v. Board of Education of County of Lincoln, supra, decided in 1978, applied the standard set forth in Mt. Healthy City Board of Education v. Doyle, supra, a test which has uniformly applied to patronage dismissal actions since that time. Tanner v. McCall, 625 F. 2d 1183 (5th Cir. 1980) cert. denied 451 U.S. 907 (1981); Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1981) cert. denied 454 U.S. 832 (1981); Nekolny v. Painter, 653 F. 2d 1164 (7th Cir. 1981) cert. denied 102 S. Ct. 1719 (1982); Barrett v. Thomas, 649 F. 2d 1193 (5th Cir. 1981) cert. denied 102 S. Ct. 1769 )1982); McMullan v. Thornburgh, supra, Farkas v. Thornburgh, 493 F. Supp. 1168 (E.D. Pa. 1980) affirmed mem. 633 F. 2d 209 (3d

Cir. 1980) affirmed mem. sub nom appeal of Farkas 642 F. 2d 441 (3d Cir. 1981); Visser v. Magnarelli, 530 F. Supp. 1165 (N.D. N.Y. 1982); Abraham v. Pekarski, 537 F. Supp. 859 (E.D. Pa. 1982).[16] The Mt. Healthy test, reaffirmed in Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), provides that, once plaintiff has satisfied his prima facie burden of demonstrating (1) that his conduct was constitutionally protected; and (2) that his conduct was a "substantial" or "motivating" factor in the decision to terminate him, then defendant must prove by a preponderance of the evidence that the same employment decision would have been reached as to plaintiff even in the absence of the

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[16] Although Sands v. Starke County Board of Commissioners, 530 F. Supp. 712 (N.D. Ind. 1982) did not cite the Mt. Healthy test in its decision, it did rely upon the opinion in Wren v. Jones, supra, which did apply Mt. Healthy.

protected conduct, i.e., that plaintiffs' political affiliation was not the "sole cause" of his termination. There is no inconsistency between "sole cause" and the Mt. Healthy/Givhan standard which might reasonably be viewed as the basis for misconception of the scope of Elrod and the public employees' first amendment rights. If the sole cause of Plaintiffs' terminations was a reason other than political affiliation, Defendants shoulder the burden of proof of that reason once Plaintiffs have established a prima facie case. The Court holds that Plaintiffs' constitutional rights were "clearly established" at the time of their terminations,[17] and thus that Defendants are not entitled to summary

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[17] The Court is further of the opinion that, in view of the expansive holdings in Elrod and Branti, Defendants reasonably could not have permitted political considerations to play a part

Defendants are not entitled to summary judgment on that ground.

Under Harlow, the ruling just stated completes this Court's analysis of Defendants' immunity defense for purposes of the instant motion. "On summary judgment, the judge appropriately (must) determine. . . whether the law was clearly established at the time an action occurred. . . . If the law was clearly

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(footnote 17, continued)

in the decision to terminate Plaintiffs even if the meaning of "sole cause" was not clearly established. Those decisions plainly prohibit conditioning public employment upon political affiliation. If in fact Defendants chose to interpret those decisions as permitting them to select for discharge only those of the opposing political party where a legitimate basis for discharging someone existed, they did so at their own risk. The Court cannot hold that a reasonable government official would have made such a determination in light of Elrod and Branti. For this Court to award Defendants summary judgment on the proffered basis would strip public employees of the protection afforded by the Elrod and Branti holdings.

established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." 102 S. Ct. at 2739.

The sole remaining ground relied upon by Defendants addresses itself to the merits of the case. Defendants argue, relying upon voluminous affidavits and exhibits, that their good faith has been conclusively established, and that the Court may find as a matter of law that they are, therefore, entitled to judgment. Plaintiffs' response, however, sets forth allegations which, if assumed to be true for the purposes of this motion, create genuine issues of material fact precluding summary judgment.[18] See

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[18] Defendants have challenged Plaintiffs' response by moving to strike the supporting affidavit of Plaintiffs' counsel submitted therewith. However, since this Court found it unnecessary to base its ruling upon the affidavit, the motion will be denied.

Scheuer v. Rhodes, supra, at 249-250.

Accordingly, in view of the foregoing, the Court hereby ORDERS:

1. The motion of Defendants Gum, Gilbertson and Miller for judgment on the pleadings is denied as moot;

2. The motion of Defendant Rockefeller for judgment on the pleadings is denied as moot;

3. The motion of Defendants Gum, Gilbertson and Miller for continuance and consolidation with trial on the merits is denied as moot;

4. The motion of Defendant Rockefeller for continuance and for consolidation with trial on the merits is denied as moot;

5. The motion of Defendant Rockefeller for judgment on the pleadings and for summary judgment is denied as moot;

6. The motion of Defendants Gum,

Gilbertson and Miller to dismiss Plaintiff Drexelene Perrine is granted;

7. The motion of Defendant Rockefeller to dismiss Plaintiff Drexelene Perrine is granted;

8. The motion of Defendants Gilbertson and Miller for judgment on the pleadings and for summary judgment is denied;

9. The motion of Defendant Rockefeller to dismiss the amended complaint is denied;

10. The motion of Defendants Gilbertson and Miller for summary judgment based on official immunity is denied;

11. The motion of Defendant Rockefeller for summary judgment based on official immunity is denied; and

12. The motion of Defendant Rockefeller to strike the affidavit of Plaintiffs' counsel is denied.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

ENTER: 7/21/83

/s/ Charles H. Haden, II
Charles H. Haden II,
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1790

John M. Bever, et al, Appellees,

versus

Walter Gilbertson and
Charles L. Miller, Appellants,

and John Gum, et al Defendants.

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No. 83-1791

John M. Bever, et al, Appellees,

versus

John D. Rockefeller, IV, Appellant,

and

John Gum, et al, Defendants.

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O R D E R

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The appellants' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A

poll of the court was requested, and in the poll there was an equal division of the participating judges in regular active service. Judges Russell, Widener, Hall and Chapman voted in favor of en banc rehearing while Judges Winter, Phillips, Murnaghan and Ervin voted against it. Judge Sprouse disqualified himself.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Haynsworth for a panel consisting of Judge Winter, Judge Hall, and Judge Haynsworth.

For the Court,

/s/ William K. Slate, II
CLERK

*APPENDIX D*

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 83-1791

John M. Bever, Clearyl Davis, John E. Ellifritt, Cecil Fling, Drexelene Perrine, Francis D. Radcliff, Robert W. Robinson, Michael Shepherd, Larry Williams, Larry W. Griffin, Appellees,

v.

John D. Rockefeller, IV, Appellant,

and

John Gum, Walter Gilbertson, Wilton Williams, Charles L. Miller, individually and as Commissioner of the West Virginia Department of Highways, Defendants.

Appeal from the United States District Court for the _____ District of South Caroline.

This cause came to be heard on the record from the United States District Court for the _____ District

of South Carolina.

On consideration whereof, it is now here ordered and adjudged by this Court that a certificate of probable cause to appeal is denied, and the appeal is hereby, dismissed.

/s/ William K. Slate, II
CLERK

# APPENDIX E

## AMENDMENTS TO THE CONSTITUTION

(Amendment I)

(Freedom of Religion, of Speech, and of the Press)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(Amendment IX)

(Reservation of Rights of the People)

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(Amendment XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virginia Island, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655 § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

§ 17-2A-4. Selection, organization, classification, etc., of personnel; business manager and chief engineer assistants; employees' bonds.

The commissioner shall be in charge of and responsible for the selection, employment and effective organization of all commission personnel for the entire state road and highway program. He may establish such divisions, sections and other functional and organizational units within the commission as may be necessary and practical in the full and effective discharge of the duties and responsibilities of his office. Except as otherwise provided by law, all commission personnel shall be classified pursuant to the job classification system and shall be paid pursuant to the salary scale established by the commissioner.

The commissioner shall select and employ a business manager assistant and one or more chief engineer assistants who shall be registered professional engineers, and shall establish such other offices, activities, divisions, sections and organizational units as may be necessary and practical. The business manager assistant shall be in charge of and responsible for matters of finance and such other functions as may be assigned to him from time to time by the commissioner. The chief engineer assistant or, if the commissioner has selected and employed more than one chief engineer assistant, the chief engineer assistants shall be in charge of and

responsible for planning, equipment, materials, construction, maintenance, and such other functions as may be designated by the commissioner as well as such other functions as may from time to time be assigned to such chief engineer assistant or assistants by the commissioner.

The commissioner shall require every employee who collects fees or handles funds or who has custody or control of equipment or supplies belonging to the State to give bond, with such sureties and in such penal sums as may be approved by the commissioner, for the faithful discharge of each such employee's duties and his accounting for all such fees, funds, equipment and supplies coming into his hands or under his custody or control. All such bonds, when approved by the commissioner, shall be filed in the office of the secretary of state. Premiums on all such bonds shall be paid from commission funds. (1957, c. 143; 1973, c. 116.)